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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEN ROY HOBBS,

Plaintiff and Appellant,

v.

K. R. HENSLEY et al.,

Defendants and Respondents.

D047624

(Super. Ct. No. 93415)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Reversed.

Inmate Allen Roy Hobbs appeals a judgment of dismissal in favor of defendants K. R. Hensley, R. Houston and R. Anti (collectively, the defendants) in his action against them for injuries he suffered while incarcerated. He contends that the trial court abused its discretion in dismissing the action under Code of Civil Procedure section 583.410, subdivision (a)(1), the discretionary dismissal statute. (All further statutory references are to the Code of Civil Procedure.) We agree and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 16, 1997, Hobbs filed this action in propria persona. In January 1998, the trial court granted Hobbs's application for a waiver of court fees and costs. After a series of demurrers, Hobbs filed his third amended complaint in January 1999, and the defendants answered the complaint three months later. In July 1999, Hobbs filed an at-issue memorandum, an arbitration conference statement and an objection to arbitration and in September 1999, the trial court denied his motion for an order setting the discovery cut-off and trial dates.

In June 2000, the trial court denied Hobbs's motion for appointment of counsel. In August 2000, the trial court ordered the matter to arbitration and the following month, it appointed an arbitrator and ordered that an arbitration hearing be scheduled within 90 days. In December 2000, three and one-half years after he filed this action, Hobbs retained an attorney who substituted in as his attorney of record. After conducting four depositions in 2001, counsel abandoned Hobbs in April 2002, and over the next 14 months, Hobbs sent five letters to his counsel. In June 2003, Hobbs sent a letter to the court inquiring as to the last document filed on his behalf. After receiving the court's reply, he sent a letter to his counsel accusing her of being untruthful. About six months later, Hobbs filed a complaint against his counsel with the California State Bar. In April, May and June 2004, Hobbs sent letters to his counsel asking for his case file.

In early March 2005, defendants moved to dismiss the action under the five-year mandatory dismissal statute. (§ 583.310.) Hobbs opposed the motion and requested an order that he be substituted in propria persona to prosecute the action because his counsel

had abandoned him. In April 2005, the trial court removed the action from arbitration, denied Hobbs's request to be substituted in pro per because he failed to comply with proper procedures, and denied the motion to dismiss, expressly stating it was giving Hobbs six months to get the case to trial. The following month, Hobbs substituted in as a pro per plaintiff and moved to set the matter for trial after receiving a letter from his counsel indicating she copied his documents and anyone with a written authorization could obtain them or she would ship them if he sent a pre-paid shipping label.

In June 2005, defendants moved to dismiss the action under the discretionary dismissal statute (§ 583.410) and shortly thereafter, the trial court set the matter for trial in September. Hobbs opposed the dismissal motion and moved for a court order that: (1) his prior counsel produce his case file; (2) he be transported from prison for trial; and (3) various inmates and state employees be produced as witnesses. After hearing oral argument from Hobbs, the trial court took the dismissal motion under submission, denied all of Hobbs's motions, except for his motion to be transported for trial, and instructed the clerk to issue trial subpoenas for Hobbs and provide him with a copy of his third amended complaint. On August 18, the trial court granted the dismissal motion because Hobbs had offered no explanation for his inaction after learning of his attorney's misconduct. Thereafter, the trial court denied Hobbs's motion for reconsideration and entered judgment for the defendants.

DISCUSSION

A plaintiff must proceed with reasonable diligence in prosecuting a civil action (§ 583.130) and a trial court has discretion to dismiss an action for delay in prosecution if

doing so appears appropriate under the circumstances of the case. (§ 583.410.) In ruling on a motion for discretionary dismissal, a trial court must consider "all matters relevant to a proper determination of the motion," including, as relevant to this appeal, the court file, settlement negotiations or discussions, the diligence of the parties, the nature and complexity of the case, the nature of any delays, the interests of justice, and any other fact or circumstance relevant to a fair determination of the issues. (Cal. Rules of Court, rule 373(e).)

In reviewing a discretionary dismissal, we must presume the trial court's order was correct, and it is the plaintiff's burden to overcome that presumption and establish an abuse of discretion. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) An abuse of discretion occurs only if the trial court's decision exceeds the bounds of reason. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698.) Unless a clear case of abuse is shown and there has been a miscarriage of justice, we will not substitute our judgment for that of the trial court. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

In ruling on the motion, the trial court acknowledged the principle that a client cannot be penalized for his attorney's abandonment of an action (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 204-205), but found that: "Hobbs was aware of [his attorney's] misconduct sometime before [January] 16, 2004 when he filed a complaint with the State Bar. Despite his awareness of the misconduct, and despite the fact that the case was then over seven years old, [he] took no steps to protect his rights and move the case to trial for over one year, and then only when

confronted with a motion to dismiss for failure to prosecute. [Hobbs] offer[ed] no explanation for his inaction after learning of [his attorney's] misconduct, and therefore this delay is attributable to him."

Hobbs contends that, under the circumstances before it, the trial court abused its discretion in dismissing the action because his prior attorney and the court clerks were to blame for any delay. He misses the more persuasive argument, however, that he *could not* bring this action to trial for a lengthy period of time because the court ordered the matter to arbitration in August 2000 and the case remained in arbitration until the court removed it on April 14, 2005 and gave Hobbs six months to get the matter to trial. Hobbs, defendants and the trial court are equally responsible for allowing this action to languish in arbitration for almost four years.

After the trial court removed the matter from arbitration and imposed a six-month time period to have the action tried, Hobbs substituted into the proceedings in propria persona and moved to set a trial date in September, which was within the aforementioned six-month period. Thereafter, the defendants moved to dismiss the action and the trial court set the matter for trial on September 21, 2005. Hobbs then took action to get this matter to trial by opposing the dismissal motion and moving for court orders that his prior counsel produce his case file and that various inmates and state employees appear as witnesses. About six weeks before the trial date, the court took the dismissal motion under submission, granted Hobbs's request to be transported for trial and instructed the clerk to issue trial subpoenas for Hobbs and provide him with a copy of his third amended complaint. Inexplicably, the trial court then pulled the rug out from under

Hobbs by dismissing the action the following week, rather than waiting to see whether the trial actually went forward as scheduled.

Although Hobbs's activity after the trial court removed the action from arbitration was highly relevant to a proper determination of motion, the court focused on an earlier 14-month period while the case was still in arbitration and could not be brought to trial. The trial court also ignored its prior order giving Hobbs six months to get the matter to trial, the fact the action was actually set for trial the following month, and Hobbs had an order allowing him to appear for trial. Under these unique circumstances, dismissal was not appropriate and the trial court abused its discretion in granting the defendants' motion.

DISPOSITION

The judgment is reversed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.